

Nonresponsive

From: Psyk, Christine

Sent: Friday, December 20, 2013 3:19 PM

To: ALDRICH Greg; Snow, Patty

Cc: foster.eugene@deq.state.or.us; amanda.punton@state.or.us; Carlin, Jayne;
allison.castellan@noaa.gov; Waye, Don; Henning, Alan; Wu, Jennifer; Powers, David

Subject: CORRECTION --EPA/NOAA Comments on New Development MM Submitted in September 2013
Greg and Patty,

Unfortunately, right after I sent you the comments on New Development we discovered a sentence that was incorrectly phrased. So, we've corrected it and I am resending the comments. I'm sending you a redlined version that shows specifically the corrected sentence and a clean version. Apologize for the confusion.

Thanks for your patience.

Christine Psyk

Associate Director, R10 OWW

206-553-1906

psyk.christine@epa.gov

I. UNMET CONDITIONS

A. URBAN AREAS MANAGEMENT MEASURES – NEW DEVELOPMENT

PURPOSE OF MANAGEMENT MEASURE: The purpose of this management measure is four-fold: (1) decrease the erosive potential of increased volumes and velocities of stormwater associated with development-induced changes in hydrology; (2) remove suspended solids and associated pollutants entrained in runoff that result from activities occurring during and after development; (3) retain hydrological conditions that closely resemble those of the pre-disturbance condition; and (4) preserve natural systems including in-stream habitat.

CONDITION FROM JANUARY 1998 FINDINGS: Within two years, Oregon will include in its program: (1) management measures in conformity with the 6217(g) guidance; and (2) enforceable policies and mechanisms to ensure implementation throughout the coastal nonpoint management area. (1998 Findings, Section IV.A).

PROPOSED FINDING: Oregon has not yet satisfied this condition.

RATIONALE: On September 20, 2013, the Oregon Department of Environmental Quality (ODEQ) submitted to the federal agencies an updated draft of its *Guidance to Urban and Rural Residential Designated Management Agencies for Including Post-Construction Elements in TMDL Implementation Plans*. In its September 2013 submittal the State proposed to use its new TMDL implementation plan guidance to voluntarily implement the new development management measure through its TMDL implementation program. While Oregon has direct regulatory authority pursuant to OAR 340-042-0080 to require Designated Management Agencies (DMAs) to develop and implement TMDL implementation plans to meet their assigned load allocations, the authority and the guidance only requires plans to develop and implement post-construction stormwater management programs where stormwater is assigned a load allocation; elsewhere the guidance strongly recommends DMAs implement post-construction stormwater management programs. Oregon's strategy for meeting the new development management measure is voluntary on affected DMAs since conformity with the new development management measure is "strongly encouraged" by Oregon DEQ, but not required. Per NOAA-EPA's 1998 *Final Administrative Changes Memo*, a state may rely on voluntary approaches, so long as they are backed by enforceable policies and mechanisms. This memo establishes that for the federal agencies to approve program elements that rely on voluntary programs, the State must provide a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, that it will use to encourage implementation of the management measures, as well as a commitment to use the existing enforcement authorities where necessary. The State has not yet committed to using its back-up enforcement authority to require implementation of the new development management measure, where necessary, nor has it sufficiently described how it will proactively encourage implementation of the management measure through this voluntary program.

The federal agencies would accept a TMDL implementation approach, provided there is wide geographic coverage of TMDLs across a state's coastal nonpoint management area along with a requirement to implement the TMDL in a manner that meets the intent of the new development

management measure. The standard required by the new development management measure is to reduce (by design or performance) post-construction development total suspended solids (TSS) loadings by 80% or reduce TSS loadings so that the average annual TSS loads are no greater than pre-development loadings, and to maintain post-construction development peak runoff rate and average volume at pre-development levels.

At this point, NOAA and EPA would like to obtain clarification on where in the coastal nonpoint management area the post-construction stormwater management program is required, either through existing or planned TMDLs, and where it is only recommended. It is the federal agencies understanding that while urban and rural residential DMAs must implement load allocations for TMDLs established for bacteria and sediment that would likely necessitate post-construction stormwater management programs for affected DMAs, the same may not be true for temperature TMDLs. There may be other pollutants that would lead to development of post-construction stormwater management programs by urban and rural residential DMAs, but they appear to be less common in Oregon's coastal nonpoint management area. Oregon should submit a map showing the geographic extent of existing and planned TMDLs where urban and rural residential DMAs would be required to develop post-construction stormwater management programs, as well as where they would be recommended. The map should also show all the urban growth boundaries within the coastal nonpoint management area, at least approximately.

DMAs must incorporate mechanisms to monitor implementation of management strategies and assess the effectiveness of those strategies in meeting water quality standards into their TMDL implementation plans. ODEQ's September 2013 *Draft Guidance to Urban and Rural Residential Designated Management Agencies for Including Post-Construction Elements in TMDL Implementation Plans* states that post-construction stormwater management programs developed by an urban or rural residential DMA for a TMDL implementation plan are strongly encouraged to meet the new development management measure or an equivalent performance standard. The State has also developed a tracking matrix for DMAs to describe and report on implementation of their plans on a regular basis.

To promote the draft guidance and encourage implementation of the 6217(g) new development management measures, the State committed to develop a process and schedule for training and educating DMAs and other stakeholders about the guidance. Although the federal agencies applaud Oregon for its vision to carry out a proactive outreach program to accompany the guidance, the federal agencies need a more detailed description of the specific outreach strategy the State will implement. Without a better understanding of how the State plans to promote the guidance and the requirements and recommendations it contains, the federal agencies are not able to determine if the draft guidance would provide for adequate implementation of the new development measure.

Oregon's draft TMDL implementation plan guidance could serve to meet the new development management measure, provided the State is able to meet the other requirements for a voluntary program, i.e., provide a more detailed outreach strategy and an unequivocal commitment to use its back-up authorities to require implementation of the new development management measure, as necessary. Specifically regarding the latter, the State should replace any ambivalent language concerning enforcement in its final TMDL implementation guidance. For example, on p. 7 of the

September 2013 draft guidance, NOAA and EPA recommend changing “DEQ anticipates that enforcement will be used as a measure of last resort when cooperative endeavors are not successful” to “DEQ will use its enforcement authority when cooperative endeavors are not successful”. Finally, NOAA and EPA cannot approve a program based on a submittal of draft guidance; such guidance must be final and operational.

Beyond the State’s reliance on a voluntary approach, portions of Oregon’s coastal nonpoint management area that are designated as MS4 areas are excused from implementing the new development management measure, per the federal agencies’ December 20, 2002, memo, *Policy Clarification on Overlap of 6217 Coastal Nonpoint Programs with Phase I and II Stormwater Regulations*, as they are regulated under the National Pollutant Discharge and Elimination System (NPDES) Phase I and II stormwater permit program. The federal agencies rely on the NPDES program to manage polluted runoff from new development in these areas. Currently in Oregon, the City of Ashland, the City of Medford, and the Rogue Valley Sewer Services (which includes the cities of Central Point, Phoenix and Talent, and portions of Jackson County in the Medford Urbanized Area) are the only MS4s within the coastal nonpoint management area.

In summary, the federal agencies encourage the State to develop a proactive outreach and training strategy to promote the guidance and implementation of the new development measure throughout the coastal nonpoint management area. In addition, the federal agencies urge the State to commit to taking enforcement action to require the implementation of the new development management measure when cooperative endeavors with DMAs are not successful within a reasonable time frame.

I. UNMET CONDITIONS

A. URBAN AREAS MANAGEMENT MEASURES – NEW DEVELOPMENT

PURPOSE OF MANAGEMENT MEASURE: The purpose of this management measure is four-fold: (1) decrease the erosive potential of increased volumes and velocities of stormwater associated with development-induced changes in hydrology; (2) remove suspended solids and associated pollutants entrained in runoff that result from activities occurring during and after development; (3) retain hydrological conditions that closely resemble those of the pre-disturbance condition; and (4) preserve natural systems including in-stream habitat.

CONDITION FROM JANUARY 1998 FINDINGS: Within two years, Oregon will include in its program: (1) management measures in conformity with the 6217(g) guidance; and (2) enforceable policies and mechanisms to ensure implementation throughout the coastal nonpoint management area. (1998 Findings, Section IV.A).

PROPOSED FINDING: Oregon has not yet satisfied this condition.

RATIONALE: On September 20, 2013, the Oregon Department of Environmental Quality (ODEQ) submitted to the federal agencies an updated draft of its *Guidance to Urban and Rural Residential Designated Management Agencies for Including Post-Construction Elements in TMDL Implementation Plans*. In its September 2013 submittal the State proposed to use its new TMDL implementation plan guidance to voluntarily implement the new development management measure through its TMDL implementation program. While Oregon has direct regulatory authority pursuant to OAR 340-042-0080 to require Designated Management Agencies (DMAs) to develop and implement TMDL implementation plans to meet their assigned load allocations, the authority and the guidance only requires plans to develop and implement post-construction stormwater management programs ~~that are in conformity with the new development management measure~~ where stormwater is ~~an~~-assigned a load allocation; elsewhere the guidance strongly recommends DMAs implement post-construction stormwater management programs. Oregon's strategy for meeting the new development management measure is voluntary on affected DMAs since conformity with the new development management measure is "strongly encouraged" by Oregon DEQ, but not required. Per NOAA-EPA's 1998 *Final Administrative Changes Memo*, a state may rely on voluntary approaches, so long as they are backed by enforceable policies and mechanisms. This memo establishes that for the federal agencies to approve program elements that rely on voluntary programs, the State must provide a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, that it will use to encourage implementation of the management measures, as well as a commitment to use the existing enforcement authorities where necessary. The State has not yet committed to using its back-up enforcement authority to require implementation of the new development management measure, where necessary, nor has it sufficiently described how it will proactively encourage implementation of the management measure through this voluntary program.

The federal agencies would accept a TMDL implementation approach, provided there is wide geographic coverage of TMDLs across a state's coastal nonpoint management area along with a

requirement to implement the TMDL in a manner that meets the intent of the new development management measure. The standard required by the new development management measure is to reduce (by design or performance) post-construction development total suspended solids (TSS) loadings by 80% or reduce TSS loadings so that the average annual TSS loads are no greater than pre-development loadings, and to maintain post-construction development peak runoff rate and average volume at pre-development levels.

At this point, NOAA and EPA would like to obtain clarification on where in the coastal nonpoint management area the post-construction stormwater management program is required, either through existing or planned TMDLs, and where it is only recommended. It is the federal agencies understanding that while urban and rural residential DMAs must implement load allocations for TMDLs established for bacteria and sediment that would likely necessitate post-construction stormwater management programs for affected DMAs, the same may not be true for temperature TMDLs. There may be other pollutants that would lead to development of post-construction stormwater management programs by urban and rural residential DMAs, but they appear to be less common in Oregon's coastal nonpoint management area. Oregon should submit a map showing the geographic extent of existing and planned TMDLs where urban and rural residential DMAs would be required to develop post-construction stormwater management programs, as well as where they would be recommended. The map should also show all the urban growth boundaries within the coastal nonpoint management area, at least approximately.

DMAs must incorporate mechanisms to monitor implementation of management strategies and assess the effectiveness of those strategies in meeting water quality standards into their TMDL implementation plans. ODEQ's September 2013 *Draft Guidance to Urban and Rural Residential Designated Management Agencies for Including Post-Construction Elements in TMDL Implementation Plans* states that post-construction stormwater management programs developed by an urban or rural residential DMA for a TMDL implementation plan are strongly encouraged to meet the new development management measure or an equivalent performance standard. The State has also developed a tracking matrix for DMAs to describe and report on implementation of their plans on a regular basis.

To promote the draft guidance and encourage implementation of the 6217(g) new development management measures, the State committed to develop a process and schedule for training and educating DMAs and other stakeholders about the guidance. Although the federal agencies applaud Oregon for its vision to carry out a proactive outreach program to accompany the guidance, the federal agencies need a more detailed description of the specific outreach strategy the State will implement. Without a better understanding of how the State plans to promote the guidance and the requirements and recommendations it contains, the federal agencies are not able to determine if the draft guidance would provide for adequate implementation of the new development measure.

Oregon's draft TMDL implementation plan guidance could serve to meet the new development management measure, provided the State is able to meet the other requirements for a voluntary program, i.e., provide a more detailed outreach strategy and an unequivocal commitment to use its back-up authorities to require implementation of the new development management measure, as necessary. Specifically regarding the latter, the State should replace any ambivalent language

concerning enforcement in its final TMDL implementation guidance. For example, on p. 7 of the September 2013 draft guidance, NOAA and EPA recommend changing “DEQ anticipates that enforcement will be used as a measure of last resort when cooperative endeavors are not successful” to “DEQ will use its enforcement authority when cooperative endeavors are not successful”. Finally, NOAA and EPA cannot approve a program based on a submittal of draft guidance; such guidance must be final and operational.

Beyond the State’s reliance on a voluntary approach, portions of Oregon’s coastal nonpoint management area that are designated as MS4 areas are excused from implementing the new development management measure, per the federal agencies’ December 20, 2002, memo, *Policy Clarification on Overlap of 6217 Coastal Nonpoint Programs with Phase I and II Stormwater Regulations*, as they are regulated under the National Pollutant Discharge and Elimination System (NPDES) Phase I and II stormwater permit program. The federal agencies rely on the NPDES program to manage polluted runoff from new development in these areas. Currently in Oregon, the City of Ashland, the City of Medford, and the Rogue Valley Sewer Services (which includes the cities of Central Point, Phoenix and Talent, and portions of Jackson County in the Medford Urbanized Area) are the only MS4s within the coastal nonpoint management area.

In summary, the federal agencies encourage the State to develop a proactive outreach and training strategy to promote the guidance and implementation of the new development measure throughout the coastal nonpoint management area. In addition, the federal agencies urge the State to commit to taking enforcement action to require the implementation of the new development management measure when cooperative endeavors with DMAs are not successful within a reasonable time frame.